Supreme Court, U.S.
FILED

941632 MAR 30 1995

OFFICE OF THE CLERK

No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BENJAMIN F. CADES, INDIVIDUALLY, AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

Petitioner,

v.

H & R BLOCK, INCORPORATED; BENEFICIAL NATIONAL BANK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

JOHN B. LONG
DYE, TUCKER, EVERITT, WHEALE & LONG
P.O. Box 2426
Augusta, Georgia 30903
(706) 722-0771

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

38 pp

I.

QUESTIONS PRESENTED FOR REVIEW

1. Does this Court's opinion in Marquette National Bank of Minneapolis v. First of Omaha Service Corp., 439 U.S. 299 (1978), permit a national bank chartered in Delaware to export Delaware usury law to South Carolina where income tax refund anticipation loans were negotiated in face-to-face dealings and made?

2. Do the provisions of the Federal Truth-in-Lending Act, 15 U.S.C. § 1638(b)(1), which requires that a creditor make disclosures before consummation of a transaction permit a lender to acquire an irrevocable assignment of an income tax refund prior to making the required disclosures under the Act?

3. Do the provisions of the Federal Truth-in-Lending Act, 15 U.S.C. § 1606, 15 U.S.C. § 1638(a)(4), and the regulations promulgated thereunder in 12 C.F.R. § 226.17(c)(5) permit the disclosures of an Annual Percentage Rate (APR) based on a loan payable in one year when in essence the loans are loans payable in two to three weeks?

II.

LIST OF ALL PARTIES TO THE PROCEEDINGS

1. Beneficial National Bank (hereinafter referred to as "Beneficial"), a national bank organized and existing under the laws of the State of Delaware.

2. H & R Block, Inc. (hereinafter referred to as "Block").

3. Benjamin F. Cades (hereinafter referred to "Cades"), and other individuals in South Carolina who obtained similar tax refund anticipation loans.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF ALL PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED 1

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 5

A. Course of Proceedings Below 6
B. Basis for Federal Jurisdiction in the Court of First Instance 7

ARGUMENT AMPLIFYING THE REASONS RELIED UPON FOR ALLOWANCE OF CERTIORARI 8

CONCLUSION 14

IV.

TABLE OF AUTHORITIES

	PAGE
Cades v. H & R Block, Inc. and Beneficial National Bank, 43 F.3d 870 (4th Cir. 1994)	1
First Nat'l Bank of Plant City v. Dickinson, 396 U.S. 122 (1969)	2
Marquette National Bank of Minneapolis v. First of Omaha Service Corp., 439 U.S. 299 (1978)	*passim*
Murphy v. Empire of America, 746 F.2d 931 (2nd Cir. 1984) at 934	8, 12
Waters v. Weyerhaeuser Mortgage Company, 582 F.2d 503 (9th Cir. 1978)	8
Constitutional and Statutory Provisions:	
12 C.F.R. § 226.17(b)	12
12 C.F.R. § 226.17(c)(5)	i, 13
12 C.F.R. § 226.17(c)(17)	13
12 U.S.C. § 1842(d)	10

PAGE

Constitutional and Statutory Provisions (cont'd):

12 U.S.C. § 36(f)	*passim*
12 U.S.C. § 81	1, 2, 9
12 U.S.C. § 85	1, 2, 9, 11
15 U.S.C. § 1601	7
15 U.S.C. § 1606	ii
15 U.S.C. § 1635	12
15 U.S.C. § 1635(a)	8
15 U.S.C. § 1638(a)(4)	i, 4, 13
15 U.S.C. § 1638(b)(1)	i, 1, 4, 12
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1291	7
28 U.S.C. § 1332.	7
Public Law 103-328	10
Public Law 103-328 § 102(f)(1)(A)	11

PAGE

Constitutional and Statutory Provisions (cont'd):

Revenue Procedures 91-69	5
Revenue Procedures 91-69, § 3.01	5
Revenue Procedures 91-69, § 5.08	5
Revenue Procedures 91-69, § 9.03(6)(a)	6
S.C. Code Ann. § 36-3-108	13

Other:

Malone, Dumas. Jefferson and the Rights of Man. (Little, Brown & Co. 1951) 11

V.

OPINIONS BELOW

Cades v. H & R Block, Inc. and Beneficial National Bank, is published at 43 F.3d 870 (4th Cir. 1994).

VI.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

i. The opinion of the Fourth Circuit was entered on December 30, 1994.

ii. There was no petition for rehearing and there has been no order granting an extension of time within which to file a petition for writ of certiorari.

iii. Jurisdiction of this Court is involved pursuant to 28 U.S.C. § 1254(1).

VII.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Former 12 U.S.C. § 36(f), 12 U.S.C. § 81, 12 U.S.C. § 85, and 15 U.S.C. § 1638(b)(1).

12 U.S.C. § 36(f) prior to the 1994 amendment states:

§ 36. Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * *

> **(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.**

12 U.S.C. § 81 states:

§ 81. Place of business

The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

12 U.S.C. § 85 states:

§85. Rate of Interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or

District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank if located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

(R.S. §5197; June 16, 1933, c. 89, §25, 48 Stat. 191; Aug. 23, 1935, c. 614, §314, 49 Stat. 711; Oct. 29, 1974, Pub. L. 93-501, Title II, §201, 88 Stat. 1558; Nov. 5, 1979, Pub. L. 96-104, Title I, §101, 93 Stat. 789; Dec. 28, 1979,

Pub. L. 96-161, Title II, §201, 93 Stat. 1235; Mar. 31, 1980, Pub. L. 96-221, Title V, §529, 94 Stat. 168.)

15 U.S.C. § 1638(a)(4) states:

(a) For each consumer credit transaction other than under an open end credit plan, the creditor shall disclose each of the following items, to the extent applicable:

*** * ***

(4) The finance charge expressed as an "annual percentage rate", using that term. This shall not be required if the amount financed does not exceed $75 and the finance charge does not exceed $5, or if the amount financed exceeds $75 and the finance charge does not exceed $7.50.

15 U.S.C. § 1638(b)(1) states:

(b)(1) Except as otherwise provided in this part, the disclosures required under subsection (a) of this section shall be made before the credit is extended. Except for the disclosures required by subsection (a)(1) of this section, all disclosures required under subsection (a) of this section and any disclosure provided for in subsection (b), (c), or (d) of section 1605 of this title shall be conspicuously segregated from all other terms, data, or information provided in connection with a transaction, including any computations or itemization.

VIII.

STATEMENT OF THE CASE

This case involves the question of whether a national bank in Delaware can export interest rates that it contends are legal in Delaware in connection with income tax refund anticipation loans made in South Carolina and what point in time and in what manner are the truth in lending disclosure statements required to be made.

On February 1, 1991, Cades went to the office of Block to have his 1990 federal and state income tax returns prepared. Block participated in the Internal Revenue Service's electronic filing program which is set forth in Revenue Procedures 91-69. As part of having his federal income tax return prepared electronically, Cades was offered an income tax refund anticipation loan from Beneficial.

Under the Internal Revenue Service's procedures, an electronic return cannot be filed until the taxpayer has signed a declaration for electronic filing (IRS Form 8453) and that form has been received by the Internal Revenue Service ("IRS"). Revenue Procedures 91-69, § 5.08. Generally, individuals cannot file their own tax returns electronically for the tax preparer must be accepted as a participant in the Internal Revenue Service's electronic filing program. Revenue Procedures 91-69, § 3.01. The Revenue Procedures 91-69 and IRS Form 8453 both provide that a taxpayer must elect to have the tax refund directly deposited in a bank and that the direct deposit

election cannot be rescinded. Revenue Procedures 91-69, § 9.03(6)(a), IRS Form 4583.

On February 1, 1991, Cades signed a Priority Application, Consent, Certification and Authorization for Rapid Refund, in which Cades irrevocably assigned his refund to Beneficial and which incorporated IRS Form 8453, and an IRS Form 8453. The Priority Application, Consent, Certification and Authorization for Rapid Refund authorized Beneficial to use the refund irrevocably assigned to it to pay the fees due Block and to deduct from the account where the refund would be deposited the money owed Beneficial. Once Block and Beneficial were advised by the IRS that Cades' return would be accepted under the electronic filing program, that is, that the refund would be electronically deposited into an account at Beneficial by the IRS, Cades returned to the offices of Block where he received the sum of $1,145, representing his federal income tax refund of $1,234 less $89 in fees and charges, $29 being a finance charge, and $45 being the electronic processing fee.

No federal truth-in-lending disclosures were given to Cades on February 1, 1991, when he signed the documents irrevocably assigning his tax refund for direct deposit with Beneficial, and the truth-in-lending disclosures were only given to Cades when he picked up his check on February 3, 1991 at the Block offices in South Carolina. When the disclosures were made, they were made based on a loan having a term of one year, even though the tax refund by the IRS were deposited with Beneficial in two to three weeks, all as set forth on IRS Form 8453.

All documents signed by Cades were signed at the Block office in Florence, South Carolina. The loan was negotiated face-to-face in South Carolina. The proceeds were picked up at the offices of Block in South Carolina. The finance charges were imposed in South Carolina.

Basis for Federal Jurisdiction in the Court of First Instance.

The jurisdiction of the United States District Court for the District of South Carolina was questioned below in a motion to remand. This action was commenced in the Court of Common Pleas of Florence County, South Carolina. Initially, Beneficial and Block removed this action based on diversity of citizenship, 28 U.S.C. § 1332. After a motion to remand was filed, Block and Beneficial sought to raise federal question jurisdiction. After the motion to remand was denied, Cades amended his complaint to allege violations of the Federal Truth-in-Lending Act, 15 U.S.C. § 1601, et seq., and violations of the National Banking Act. From a final judgment of the United States District Court for the District of South Carolina granting summary judgment to Beneficial and Block, Cades appealed that order, including the ruling on Cades' motion to remand, to the United States Court of Appeals for the Fourth Circuit. The United States Court of Appeals for the Fourth Circuit had jurisdiction over that appeal by virtue of 28 U.S.C. § 1291.

IX.

ARGUMENT AMPLIFYING THE REASONS RELIED UPON FOR ALLOWANCE OF CERTIORARI

The District Court for the District of South Carolina and the Fourth Circuit Court of Appeals have departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision as to the National Bank Act issue and as to the truth-in-lending issue relating to the amount of the APR disclosed. In ruling on the truth-in-lending issues of when truth-in-lending disclosures must be made, this decision is in conflict with the decisions of the Second Circuit Court of Appeals in Murphy v. Empire of America, 746 F.2d 931 (2nd Cir. 1984) at 934, and the Ninth Circuit in Waters v. Weyerhaeuser Mortgage Company, 582 F.2d 503 (9th Cir. 1978).

In Murphy, supra, the 3-day right of rescission which, under 15 U.S.C. § 1635(a) begins to run upon consummation of the transaction, began to run on the date that the loan commitment was signed and disclosures given, not on the date that the mortgage was signed. In Waters, supra, the court held that "consummation" occurs whenever a contractual relationship is created--not at the time of performance.

In Marquette Nat'l Bank of Minneapolis v. First of Omaha Service Corp., 439 U.S. 299 (1978), this Court approved of a national bank exporting the state law where it was located to other states in connection with the issuance of credit cards. In Marquette, the facts were that the finance charges that were assessed were in fact assessed in Nebraska, not in Minnesota; that the Bank

Americards which were the subject matter of the credit transactions were issued by First of Omaha in Omaha, Nebraska, not in Minnesota; and the Bank Americard program was located in Nebraska, not in Minnesota.

In connection with the exportation of Delaware law to South Carolina with tax refund anticipation loans, the face-to-face negotiations for the loan; the signing of all the documents; the picking up of all checks; and all aspects of these loans took place in South Carolina. In fact nothing occurred in Delaware, other than the facts that the information to print the checks was electronically transmitted from Delaware to South Carolina and that the income tax refunds were electronically transferred from the IRS to a bank account in Delaware at Beneficial. Both the District Court and the Fourth Circuit Court of Appeals failed to read the provisions of the National Bank Act, 12 U.S.C. § 81, former 12 U.S.C. § 36(f), and 12 U.S.C. § 85, together; and, as part of a comprehensive statute regulating national banks. A national bank must transact business in the place specified in its organizational certificate and in the branches established and permitted by law. 12 U.S.C. § 81. A branch bank is defined as a place where deposits are received, checks paid or money lent. Former 12 U.S.C. § 36(f). In First Nat'l Bank of Plant City v. Dickinson, 396 U.S. 122 (1969), this Court was faced with the issue of whether or not a bank's armored car service and secured receptacles for receipt of monies intended as deposits were "branches" as that term is defined by former 12 U.S.C. § 36(f). This Court held that, since former 12 U.S.C. § 36(f) was phrased in the disjunctive, the offering of any one of those three services would form the basis for a finding of a "branch" bank. 396 U.S. 135. This Court also held that while parties are free to arrange

their private rights and liabilities as they see fit, the parties could not, by the terms of a contract, define whether or not a branch did or did not exist at a certain location.

If Beneficial could not legally have branches at the Block offices in South Carolina, it cannot export Delaware law to South Carolina by making loans at Block offices in South Carolina.

If this Court's opinion in Marquette, supra, is given the construction given it by the Fourth Circuit in this case, there will be no restriction on a national bank's ability to export its rates. Historically, we have had a dual system of banking in this country. Until the passage of the Riegle-Neal Banking Act of 1994, Public Law 103-328, the Federal Reserve board could not approve an acquisition of a bank unless specifically authorized by state law. 12 U.S.C. § 1842(d) before the 1994 amendment.

Even though banks now have more opportunity to expand across state lines with the passage of the Riegle-Neal Bank Act of 1994, this change in policy has been:

a) Accomplished by the Congress, not by court rulings;

b) Accompanied with certain statutory restrictions, including limitations on the rights of states to required that a portion of the bank's assets be used for state-sponsored housing entities, limitations on concentration, compliance with the Community Reinvestment Act of 1977, the right of states to opt out of interstate merger transactions

and the statutory preservation of state laws relating to community reinvestment, consumer protection, and fair lending. See 12 U.S.C. § 36(f) after the enactment of the Riegle-Neal Banking Act of 1994. P.L. 103-328 § 102(f)(1)(A).

If the Fourth Circuit opinion is allowed to stand, banks will be allowed to ignore the restrictions on interstate banking imposed by the Riegle-Neal Banking Act, including state consumer protection statutes provided by P.L. 103-328 § 102(f)(1)(A) by merely setting up loan production offices and claim that under this court's decision in Marquette, supra, such lending is allowed under 12 U.S.C. § 85. This Court should not allow the delicate balance that exists between state and federal regulation of banks to be completely eroded by an expansive reading of this Court's opinion in Marquette, supra.

For 200 years, the conflicts that existed between Thomas Jefferson and Alexander Hamilton, including the conflicting ideas about banking, have continued. Dumas Malone, in Jefferson and the Rights of Man (Little, Brown & Co. 1951), began Chapter 16 entitled "Working with Hamilton":

> "...these two men have become symbols of a conflict of ideas which runs through the whole of American national history. No other American statesman has personified national power and the rule of the favored few so well as Hamilton, and no other has glorified self-government and the freedom of the individual to such a degree as Jefferson."

Congress, in allowing for our dual system of banking and dual system of regulation has attempted to achieve some balance between these two philosophies. That compromised balance should not be emasculated by the board reading of Marquette, supra, adopted by the Fourth Circuit.

In passing the Truth-in-Lending Act, Congress intended to require that meaningful disclosure of credit terms be made so that consumers would know the true cost of credit prior to entering into lending contracts. Congress required that the disclosures shall be made before credit is extended. 15 U.S.C. § 1638(b)(1). Regulation Z, § 226.17(b), requires that the disclosures be made before consummation. The adverb "before" means "in front", "preceding", not at the same time or contemporaneously. Making the disclosures at the same time that a check is handed to Cades is not making the disclosures "before the credit is extended" or "before consummation."

Contrary to the position of the Fourth Circuit in Murphy v. Empire of America, 746 F.2d 931 (2nd Cir. 1984), the 3-day right of rescission provided by 15 U.S.C. § 1635 was held to begin to run, not when the mortgage was signed but when the loan commitment was signed. In this case, irrevocably transferring to Beneficial income tax refunds on February 1, 1991 has the same effect as entering into a loan commitment agreement. Also, value was given in that these funds were being assigned not just to pay the loan, but to also pay Block. Under IRS procedures and as IRS Form 8453 states this election, once made, cannot be changed.

Beneficial made the truth-in-lending disclosures and disclosed that the APR would be 2.406 percent and based that disclosure on its assertion that the loan was a "demand" loan and relied on the first sentence of 12 C.F.R. § 226.17(c)(5). That was not the correct APR required to be disclosed under 15 U.S.C. § 1638(a)(4). The disclosures made were anything but "truthful." IRS Form 8453, which was an integral and necessary part of the loan transaction and was incorporated into the irrevocable assignment to Beneficial specifically provides that the refund should arrive within two or three weeks. In ruling on this issue, the Fourth Circuit failed to read the second sentence of Regulation Z, 12 C.F.R. § 226.17(c)(5) which provides:

> If an alternative maturity date is stated in the legal obligation between the parties, the disclosure shall be based on that date.

This loan was not a "demand loan" as that term is defined by Article 3, Section 108 of the Uniform Commercial Code, S.C. Code Ann. § 36-3-108. This loan was to be paid when the IRS refund was received by Beneficial which was two to three weeks. The staff commentary to Regulation Z, § 226.17(c)(17), specifically addresses refund anticipation loans and provides that the disclosures should be based on the creditor's estimate of the time that the refund will be delivered, even if the loan also contains a demand clause. The departure by the Fourth Circuit from the plain meaning of the statute and regulations calls for this Court to exercise its supervisory powers.

X.

CONCLUSION

This Court should grant this petition for certiorari and reverse the decision of the Fourth Circuit so that the Fourth Circuit's expansive application of this Court's decision in Marquette, supra, does not destroy the delicate balance of regulating banking legislated by Congress. This Court should also grant certiorari and reverse the decision of the Fourth Circuit on the two Truth-in-Lending Act issues so that the plain meaning of "before" will not be circumvented and so that truthful disclosures of the Annual Percentage Rate are in fact made.

JOHN B. LONG
Georgia Bar No. 457200
Attorney for Petitioners

Of Counsel:

DYE, TUCKER, EVERITT, WHEALE & LONG
P. O. Box 2426
Augusta, Georgia 30903
(706) 722-0771

APPENDIX

BEST AVAILABLE COPY

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 93-2555

BENJAMIN F. CADES, individually,
and on behalf of all persons
similarly situated,

Plaintiff-Appellant,

v.

H & R BLOCK INCORPORATED;
BENEFICIAL NATIONAL BANK,

Defendants-Appellees.

STATE OF WEST VIRGINIA; STATE OF MICHIGAN; STATE OF KENTUCKY; STATE OF CONNECTICUT; IOWA DIVISION OF BANKING; ARKANSAS STATE BANK DEPARTMENT; AMERICAN BANKERS ASSOCIATION; AMERICAN FINANCIAL SERVICES ASSOCIATION; CONSUMER BANKERS ASSOCIATION; DELAWARE BANKERS ASSOCIATION; MARYLAND BANKERS ASSOCIATION; NORTH CAROLINA BANKERS ASSOCIATION; SOUTH CAROLINA BANKERS ASSOCIATION; VIRGINIA BANKERS ASSOCIATION; ILLINOIS COMMISSIONER OF BANKS AND TRUST COMPANIES; DELAWARE STATE BANK COMMISSIONER; STATE OF OHIO; COMMISSIONER OF THE NEVADA DIVISION OF FINANCIAL INSTITUTIONS;

COMMISSIONER OF FINANCIAL INSTITUTIONS OF THE STATE OF UTAH; SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIRS,

Amici Curiae

Appeal from the United States District Court for the District of South Carolina at Florence. William B. Traxler, Jr., District Judge. (CA-92-1454-4-21)

Argued: June 7, 1994

Decided: December 30, 1994

Before HAMILTON, Circuit Judge, BUTZNER, Senior Circuit Judge, and GARBIS, United States District Judge for the District of Maryland, sitting by designation.

Affirmed by published opinion. Senior Judge Butzner wrote the opinion, in which Judge Hamilton and Judge Garbis joined.

COUNSEL

ARGUED: George Grice Reaves, REAVES & MOORE, Florence, South Carolina, for Appellant. Jeffrey S. Saltz, WOLF, BLOCK, SCHORR & SOLIS-COHEN, Philadelphia, Pennsylvania, for Appellees. ON BRIEF: Benjamin D. Moore, REAVES & MOORE, Florence, South Carolina; John B. Long, DYE, TUCKER, EVERITT, WHEALE & LONG, Augusta, Georgia, for

Appellant. Alan S. Kaplinsky, WOLF, BLOCK, SCHOOR & SOLIS-COHEN, Philadelphia, Pennsylvania; Thornwell F. Sowell, J. Calhoun Watson, Barbara E. Brunson, NELSON, MULLINS, RILEY & SCARBOROUGH, Columbia, South Carolina, N. Louise Ellingsworth, SMITH, GILL, FISHER & BUTTS, Kansas City, Missouri; Wheeler Neff, Assistant General Counsel, BENEFICIAL CORPORATION, Wilmington, Delaware, for Appellees. Darrell L. Dreher, Steven T. Catlett, Charles M. Oellermann, JONES, DAY, REAVIS & POGUE, Columbus, Ohio, for Amici Curiae.

OPINION

BUTZNER, SENIOR CIRCUIT JUDGE:

Benjamin F. Cades appeals district court orders denying his motion to remand his complaint to state court and granting defendants H & R Block and Beneficial National Bank summary judgment. We affirm.

I

This action arose in connection with a financial service known as a refund anticipation loan (RAL), which enables a consumer to borrow funds on a short-term demand basis in the amount of the consumer's expected federal income tax refund. Block, like many tax services, offers its customers an electronic filing and rapid refund program. In connection with the rapid refund program, Beneficial agreed to loan qualified Block customers the amount of the taxpayer's expected refund, less a flat finance charge of $29.

On February 1, 1991, in the course of processing Cades's 1990 federal tax returns, a Block representative orally explained to Cades the terms of Beneficial's RAL. He informed Cades that Beneficial charged a $29 financing fee. In addition, he explained that Block charged either $25 or $35 electronic filing. For $25 plus the $29 finance charge, a taxpayer would receive his federal income tax refund less charges from Beneficial and Block in eight days; for $35 plus the finance charge, the net refund would arrive in two days. Cades chose the latter option.

The Block representative gave Cades Beneficial's RAL application. The Block representative entered Cades's credit and other information on the application, and Cades signed it. By signing, Cades transferred to Beneficial his interest in his tax refund to the extent of his RAL. Cades also signed Internal Revenue Service Form 8453, the Federal Income Tax Declaration for Electronic Filing. He requested on this form that his federal income tax refund the directly deposited into an account in his name at Beneficial. Block submitted the application to Beneficial's office in Delaware for approval by Beneficial.

Beneficial approved the loan, and on February 3, 1991, it transmitted to Block's offices a cashier's check in the amount of $1145, representing Cades's federal income tax refund of $1234, minus $89 in charges. On the reverse of the check and on an attached stub were the terms of the loan agreement. The agreement provided, in part: "By endorsing this check above, you promise to pay us on demand the amount set forth in the 'Total of Payments' section on the attached check stub." The stub stated that the APR on the loan was 2.406 percent. Cades endorsed the check.

Beneficial is a national bank with chartered address and headquarters in Delaware. Block is a Missouri corporation with retail offices and franchisees nationwide. No corporate affiliation exists between Beneficial and Block.

Cades brought suit against Block and Beneficial in the South Carolina Court of Common Pleas, alleging that the fees charged by them violated numerous provisions of the South Carolina Consumer Protection Code and the South Carolina Unfair and Deceptive Trade Practices Act. He asked the court to certify a class action, and sought treble actual damages (in the amount of the electronic filing fee and finance charge), punitive damages, and attorneys' fees.

The defendants filed a timely notice of removal to federal court under 28 U.S.C. § 1446(a), alleging diversity jurisdiction under 28 U.S.C. § 1332. Cades moved to remand to state court. The defendants amended their notice of removal to allege federal question jurisdiction under 28 U.S.C. §§ 1331 and 1337. Cades responded to this amended notice nearly three months later. The district court denied his motion to remand. Cades then amended his complaint to allege violations of the National Bank Act, 12 U.S.C. § 86, and the Truth in Lending Act, 15 U.S.C. § 1061 *et seq.* The district court granted summary judgment to the defendants on all counts in Cades's amended complaint.

II

Cades contends that the district court improperly assumed removal jurisdiction. He asserts that although

the parties are of diverse citizenship, the requisite amount in controversy is lacking.

We need not address Cades's concern about the amount in controversy, for it is clear that after Cades amended his complaint to charge violations of the National Bank Act and the Truth in Lending Act, federal jurisdiction appeared on the face of his amended complaint. Had the action set forth in the amended complaint been brought initially in federal court, the district court would have had original jurisdiction. *See Burns v. American Nat'l Bank and Trust Co.*, 479 F.2d 26, 29-30 (8th Cir. 1973) (National Bank Act); 15 U.S.C. § 1640(e) Truth in Lending Act). At the time the district court decided the case on its merits and entered final judgment, federal jurisdiction was firmly established. In *American Fire & Casualty Co. v. Finn,* 341 U.S. 6 (1951), the Court explained that an initial lack of the right to removal may be cured when the final posture of the case does not wrongfully extend federal jurisdiction:

> There are cases which uphold judgments in the district courts even though there was no right to removal. In those cases the federal trail court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of the judgment. That is, if the litigation had been initiated in the federal court on the issues and between the parties that comprised the case at the time of trial or judgment, the federal court would have had cognizance of the case.

341 U.S. at 16 (citation omitted); *accord Able v. Upjohn Co.*, 829 F.2d 1330, 1333 (4th Cir. 1987).

Cades protests that the defendants' amended notice of removal specifying federal question jurisdiction was untimely and that the district court improperly considered it.

A motion to remand the case because of a defect in removal procedure must be made within 30 days after filing the notice of removal. 28 U.S.C. § 1447(C). An untimely removal is a defect in removal procedure. Comment on the 1988 Revision of section 1447 following 28 U.S.C.A. § 1447 (West 1994).

Cades did not object to the amended notice of removal until nearly three months after the defendants filed the amended notice. We agree with the district court that, even assuming the amended notice of removal was filed late, Cades's objection was untimely.

III

Title 12 U.S.C. § 85 authorizes a national bank to charge interest at rates permitted by the laws of the state in which the bank is located. The district court found that Beneficial was locate din Delaware and rules that its $29 finance charge complied with Delaware law. Cades assigns errors to these rulings.

In *Marquette Nat'l Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), the Supreme Court held that, even though a national bank solicited credit card customers through agents in another state, it was authorized to charge interest on card indebtedness at

the rate allowed by the state where it was located. Beneficial and Block contend that section 85 as applied in *Marquette* governs this case. Cades attempts to distinguish *Marquette* from the present case. Essentially, he asserts that in *Marquette*, cards were issued, credit was advanced, and finance charges were assessed in the national bank's home state. He argues that in this case, by contract, the loan transaction occurred in South Carolina: he signed all the relative documents there; he had face-to-face dealings with Block representatives relating to his loan there; and finance charges were assessed there.

The asserted distinctions are not convincing. It is undisputed that the loan was approved in Beneficial's Delaware office, not in South Carolina. The loan proceeds originated in Delaware and were later transmitted to South Carolina. Both *Marquette* and this case involved face-to-face solicitation of out of state consumers by agents of a national bank. In both instances, the interest rate a national bank my charge is governed by section 85, which looks to the interest rates allowed by the state where the bank is located--not where the borrower is located or where the loan transaction may be said to have occurred.

Cades next insists that we should read section 85 in the context of the National Bank Act's provisions prohibiting branch banking by national banks. He argues that under 12 U.S.C. § 81, a national bank may transact business only in the state in which it is located. He contends that Beneficial's RAL was made in Block's South Carolina office and that office therefore constitutes a "branch office" of Beneficial, as defined in 12 U.S.C. § 36(f). Beneficial's unlawful branch activities in South

Carolina, he concludes, are outside the preemptive protection of section 85 and must comply with South Carolina's usury laws.

This argument is flawed. As the district court noted, courts apply a two-part test to decide whether a bank is operating a branch office. First, the court determines whether a branch is 'establish[ed] and operate[d]" by the bank under section 36(c). If a branch is found to exist, then court then asks where the branch office is transacting branch business under section 36(f) by accepting depositions, paying checks, or lending money. *See Independent Banks Ass'n of New York v. Marine Midland Bank,* 757 F.2d 453, 456-63 (2d Cir. 1985); *cf. Independent Bankers Ass'n of America v. Smith,* 534 .2d 921, 951-52 (D.C. Cir. 1976).

The district court correctly held that the relationship of Beneficial and Block fails the first part of the test for identifying a branch office. Beneficial has no ownership or leasehold interest in Block's South Carolina offices. No Beneficial employees work in Block's offices. Beneficial exercises no authority or control over Block's employees or methods of operation. Therefore, Block's South Carolina offices are not branch offices established and operated Beneficial. Quite properly the district court did not need to reach the second part of the test. Cades's argument that South Carolina's usury laws apply in this case therefore fails.

The next question is whether Delaware law permitted Beneficial to charge Cades at $29 financing fee. Delaware Code Ann. tit. 5, § 965 (1993) states:

> [I]n lieu of periodic interest...a bank may charge and collect, as interest, in respect of a loan...[I] fees, points, finders fees and other front-end and periodic charges; provided, however, that int he case of a loan to an individual borrower, no such front-end or periodic charge may be charged and collected unless the agreement governing, or the bond, note, or other evidence of, the loan so provides....

The documents relating to Cades's transaction expressly provide for the collection of a $29 finance charge. The district court correctly ruled that the finance charge collected by Beneficial complied with Delaware law and 12 U.S.C. § 85.

We note the arguments of Cades and amici supporting him that upholding the district court no this issue will erode state sovereignty in the area of consumer lending and emasculate state usury laws. The Supreme Court considered and rejected a similar argument in *Marquette*:

> Petitioners' final argument is that the "exportation" of interest rates, such as occurred in this case, will significantly impair the ability of States to enact effective usury laws. This impairment, however, has always been implicit in the structure of the National Bank Act, since citizens of one State were free to visit a neighboring State to receive credit at foreign interest rates....[T]he protection of state usury laws is an issue of legislative

> policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court.

439 U.S. at 318-19.

IV

Cades raises two claims under the Truth in Lending Act. First, he alleges that Beneficial understated the annual percentage rate (APR) on his loan. He contends that Beneficial violated the Act's requirement that a creditor disclose to the consumer the finance charge, expressed as an annual percentage rate. *See* 15 U.S.C. § 1638(a)(4).

The Act provides that no creditor can be held liable for any act done or omitted in good faith conformity with any rule, regulation, or interpretation by the Federal Reserve Board. 15 U.S.C. § 1640(f); *see Warren v. Credithrift of America, Inc.*, 599 F.2d 829, 831-32 (7th Cir. 1979). Pursuant to its authority under section 1604, the Federal Reserve Board has adopted Regulation Z, 12 C.F.R. pt. 226 (1993), to implement the Act. The Board has also issued the Official Staff Commentary to Regulation Z and the Act. The regulations and staff commentary are "dispositive" unless "demonstrably irrational." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980).

The maturity date and corresponding APR of a loan depend on whether the loan is payable on demand or at a specified time. Section 226.17(c)(5) of Regulation Z reads: "If an obligation is payable on demand, the

creditor shall make the disclosures based on an assumed maturity of 1 year. If an alternate maturity date is stated in the legal obligation between the parties, the disclosures shall be based on that date." The disclosures, contained on a stub attached to Beneficial's loan check, describe the loan as payable "on demand." No other language relating to the loan's maturity date appears on the loan application, check, or attached stub.

Cades argues that his agreement with Beneficial did not give rise to a true demand obligation. Beneficial's usual practice, he contends, was to collect on an outstanding RAL as soon as the IRS deposited the consumer's tax refund into its account. He points out that IRS Form 8453, to which the loan application refers, states that refunds should arrive within two to three weeks after filing. He concludes that the APR should have been based on the "alternate maturity date" of two to three weeks estimated in Form 8453. Had Beneficial calculated its loan rate based on a three week maturity period, the APR would be about 17 times the stated rate of 2.406 percent.

The Official Commentary to Regulation Z explains that the terms of the obligation are to be found int he wording of the loan documents: "Disclosures for demand obligations are based on an assumed 1-year term, unless an alternate maturity date is stated in the legal obligation." 12 C.F.R. pt. 226, Supp. I, comment 17(c)(5)-1. Further, section 226.17(c)(1) emphasizes that the disclosures required depend only on the terms of the parties' legal obligations, not on the prevailing practice of a creditor. It provides: "The disclosures shall reflect the terms of the legal obligation between the parties." This precept is amplified by 12 C.F.R. pt. 226, Supp. I,

comment 17(c)(1)(-17, which recognizes that in accordance with the terms of the legal obligation, a creditor may either require payment of an RAL on demand or require payment when the refund is made. The comment explains that to determine when repayment is required, one must look to the terms of the legal obligation between the parties.

Form 8453 says nothing about when the RAL is payable, It merely provides taxpayers an estimate of when refund checks will arrive. Nor does the loan agreement anywhere provide that the RAL is payable immediately after the IRS deposits the refund int o the account at Beneficial. The agreement between Cades and Beneficial is, by its terms, a demand obligation. Beneficial properly based the APR of the loan on a maturity date of one year. The district court correctly granted summary judgment on this claim.

In Cades's second Truth in Lending Act claim, he alleges that Beneficial failed to provide him with the necessary disclosures in a timely manner. Cades does not dispute that the disclosures were attached to the cashier's check he signed on February 3. Rather, he contends that Beneficial should have provided the disclosures on February 1, the date he signed the loan application. He argues that the assignment of his tax refund to Beneficial was irrevocable on February 1 and that Beneficial obtained a security interest int he tax refund proceeds on February 1. He asserts that the transaction was consummated on February 1, rather than on February 3.

Cades argues that the purpose of the Act, to give consumers a meaningful opportunity to shop for credit, requires that disclosures in RAL transactions be given at

the time of application, rather than immediately before the consumer endorses his loan check. He points out that the Act is intended to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available." 15 U.S.C. § 1601(a).

The Act requires a creditor to maker the required disclosures "before credit is extended." 15 U.S.C. § 1638(b)(1). Section 226.17(b) of Regulation Z states: "The creditor shall make disclosures before consummation of the transaction." Regulation Z defines consummation as "the time that a consumer becomes contractually obligated on a credit transaction." 12 C.F.R. § 226.2(a)(13). In *Murphy v. Empire of America*, 746 F.2d 931, 934 (2d Cir. 1984), the court stated: "The transaction is consummated when the lender and borrower sign a contract obligating them, respectively, to lend and to borrow the funds." The Official Commentary states that whether a contract exists is "to be determined under applicable law." 12 C.F.R. pt. 226, Supp. I, comment 2(a)(13).

The loan application signed by Cades does not commit him to borrow funds from Beneficial. It states that it is being submitted "for the purpose of enabling [Beneficial] to determine whether or not to make a Refund Anticipation Loan" to the applicant. Under both Delaware and South Carolina law, Beneficial's security interest in Cades's tax refund was unenforceable until Cades endorsed his loan check on February 3, because Beneficial had given no value to Cades until that time. *See* Del. Code Ann. tit. 6, § 9-203(1)(b)(1993); S.C. Code Ann. § 36-9-203(1)(b)(1993).

Cades provides no authority to support his claim that the loan transaction was consummated at the time he signed the loan application, or that the broad purposes of the Act should override its specific provisions. In *Bissette v. Colonial Mortgage Corp. of D.C.*, 477 F.2d 1245 (D.C. Cir. 1973), the court held that a mortgagee bank was not required to make Truth in Lending Act disclosures to the borrowers until closing. It rejected the borrowers' argument that statutory policy required earlier disclosure, stating that the language of the statute and regulations was clear. 477 F.2d at 1247. *Accord Waters v. Weyerhauser Mortgage Co.*, 582 F.2d 503, 505 (9th Cir. 1978).

In holding that the transaction was not consummated until February 3, we reject Cades's argument that his irrevocable assignment of his tax refund to his account at Beneficial, through his direct deposit election on IRS Form 8453, effectively transferred all his rights int he refund to Beneficial. Funds in a depositor's account, absent an agreement to the contrary, represents a debt by the bank to the depositor and may be withdrawn by the depositor upon demand. *See Bank of Marin v. England*, 385 U.S. 99, 101 (1966).

Beneficial did not become entitled to apply the deposited funds to Cades's loan until Cades endorsed his loan check on February 3. Because Beneficial provided the required disclosures to Cades before the loan was consummated by his endorsement of Beneficial's check, the district court correctly granted summary judgment on this claim.

V

We need not consider Cades's state law claims because he did not argue them in his briefs. *See United States v. Williams,* 378 F.2d 665, 666 (4th Cir. 1967).

AFFIRMED